

Note: also sent comments on NPDES program application dated 4/29/12

## HOULTON BAND OF MALISEET INDIANS

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**Re: Comments Regarding "Public Notice of EPA's Review of Maine Water Quality Standard Revisions as They Apply in Indian Territories"**

Dear Regional Administrator Spalding,

We are writing to you regarding the State of Maine's request that its revised water quality standards (WQSs) for arsenic, acrolein, and phenol apply in our ancestral lands and territories. We respectfully request that the Environmental Protection Agency (EPA) deny this aspect of the State's request. The State does not have authority in the waters of the Houlton Band of Maliseet Indians.<sup>1</sup> Moreover, the Houlton Band's rights and resources are most likely to be protected at levels commensurate with the federal trust responsibility only if EPA retains sole authority over water quality standards in Maliseet territory.

**I. The Houlton Band of Maliseet Indians is a riverine people dependent on the Meduxnekeag River and its tributaries for its health, spirituality, and culture.**

Maliseets are river people who traditionally fish, trap, hunt, and gather. We call ourselves Wolastoqewiyik, or "People of the Beautiful, Flowing River." Our unique tribal culture and traditions are an integral part of our environment. A clean environment is essential to support our culture. The "Wolastoq," the river of our name, is now called the St. John. Our River is now bisected by an international boundary. Many Maliseet people live on First Nation Reserves in Canada. We, the Houlton Band of Maliseet Indians, are a federally recognized Indian tribe on the United States side of that border. After federal recognition in 1980, our Band purchased trust lands in Aroostook County, Maine, including substantial trust holdings on both banks of the Meduxnekeag River, a tributary of the St. John. We call our Band

<sup>1</sup> For purposes of these comments, "Maliseet waters" include those portions of the Meduxnekeag River and its tributaries that run through Houlton Band trust or fee lands, including Big Brook, Suitter Brook, Smith Brook, Dead Stream, and the small brook that enters Cochran Lake from Houlton Band fee property, as well as any other water bodies in or adjacent to these lands.



"Metahksoniqewiyik" or People of the Meduxnekeag River. Meduxnekeag is derived from a Maliseet word that translates loosely as "rocky at its mouth."

Maliseets are renowned birch bark canoe builders. Our homelands, filled with productive soils that now grow potatoes, once grew the biggest and best canoe birches. With these light, flexible, sturdy craft, we traveled the rivers and streams of the Wolastoq watershed to reach our hunting grounds and portage to streams and rivers in other watersheds. Our Band members have camped, fished, and gathered ash for baskets and fiddleheads for food along the Meduxnekeag, including those stretches along which the Band now owns property, for generations. Evidence of prehistoric activities at least as old as 8,000 years exists in fields along the Meduxnekeag.

This link to our ancestors is so strong and the land so important to us that we have fought to rebuild our community and revitalize our culture here despite pushback from the local municipality. And we have re-established our community on a site with a view of the River. One of the best fishing holes in the River is located here. Brown ash and fiddlehead ferns grow in abundance in the River's floodplains. Harvesting fiddlehead ferns in the spring for food and as a spring tonic continues to be a very important traditional practice. And making beautiful, sturdy woven baskets from brown ash is a strong and vital part of our enduring culture.

In the mid-1980s when we first began purchasing trust land along the Meduxnekeag, the River was routinely choked with long filaments of algae during the dry summer season or brown with sediments after a rainfall and contaminated with high levels of bacteria. As we instituted an environmental program in the 1990s with a strong emphasis on water resources management and water quality, we learned that fish in the River were contaminated with mercury and DDT.

In 1995, regarding the Attainment Status for 6 miles of the Meduxnekeag River in Houlton, the Maine Department of Environmental Protection (Maine DEP) noted that the "water quality model indicates that this water body segment may not be meeting the Class B . . . dissolved oxygen standard. The causes of non-attainment are the discharge of municipal wastewater and agricultural activities within the watershed." State of Maine 1994 Water Quality Assessment Appendix. Maine DEP also listed this section as a "priority" in the Table of Water Quality-Limited Rivers and Streams in Maine.

All tribal trust lands bordering the Meduxnekeag fall within this 6-mile stretch. In fact, these lands border the Meduxnekeag River near the northern and downstream end of the watershed shortly before the River crosses the border into Canada. The tribal trust lands are thus downstream of the vast majority of activities that impact water quality in the watershed. The Band has realized for some time that its water quality problems originate off tribal lands. We currently have no facilities that discharge effluent into any water body, and we have no plans for any. Two facilities upstream from Tribal lands discharge effluent into the Meduxnekeag.

A critical Tribal priority is to maintain the natural environment that supports the fish, animals, and plants on our lands and territories in order to preserve and protect our culture and traditions or "common welfare" of the Tribe. Band members want to continue traditional activities such as fishing, gathering fiddleheads, and making baskets and medicines sustainably and without fear of contamination. Environmental protection for the Maliseet is a matter of



cultural survival. Our history, legends, tradition, and culture are deeply rooted in nature. We understand that all of creation is important, that nature must be in balance, and that if we disturb that balance we will suffer. Tribal culture and tradition require the Band to manage, protect and enhance the environment so that the web of life will continue for future generations.

Unlike most of the inhabitants of Maine, the Maliseet are tied to the environment for our very existence. The foods and traditional practices of our ancestors continue to sustain the community today. It is not simply a matter of economics -that hunting, fishing and sustenance gathering of foods is "free," as some people would believe. Our biology is designed to thrive on foods such as "fiddleheads" (*emerging ostrich fern*), berries, fish, and game. But pollutants and a degraded environment are making these foods scarce and/or contaminated, thereby driving much of our community to abandon traditional diets for more processed foods. This has led to an increase in diabetes and other health issues, resulting in shorter life expectancies for the tribal community. On the other hand, despite fish consumption advisories established by the State of Maine, many Maliseet families continue to eat large amounts of fish from the River and risk exposure to higher levels of environmental contaminants than most of the general population.

Not only is the Maliseet diet tied directly to the environment, Maliseet language and spirituality is intrinsically linked to it as well. *Peskotomuhkati Wolasogewi Latuwewakon*, a Passamaquoddy-Maliseet Dictionary, lists 55 different words for water. Just to name a few: *samaqan* - water; *ososqopekot* - it is muddy water; *cinitomehson* - it is very shallow water; and *nolomopeq* - the water upriver. We are a people who have lived in our homelands since the beginning of creation. We believe that all creation, the animals, plants, rocks, and elements have spirits and are our relations. We refer to the land as Mother Earth and refer to the rocks and stones as our ancestors, those who have been here since the dawn of creation. Many of our stories reflect this belief. Our tradition tells us we were created from the brown ash tree. Several years ago, Fred Tomah, one of our tribal elders, related a Maliseet tale during an EPA Tribal Training session that describes the adventures of a journeying Indian. We learn at the end that the story of the Indian is the dream of a partridge sleeping in a tree. Many tales speak of animals turning into humans and humans turning into animals. Noxious insects come into being when the troublesome shaman Pokteinskwas upon dying turns herself into bees, hornets, flies and mosquitos.

The significance of the River in our culture is reflected in the tales of Gluskap, our culture-hero. One Maliseet tale recounts an episode in the life of Gluskap when he frees the waters of the Wolastoq from the dams of beavers who in that long ago time were much larger than they are today. Gluskap also created many of the outcroppings, islands, and stream outlets along the Wolastoq. In another tale, Gluskap helps a band of Indians whose water had become fouled by the serpent Akwulabemu. Gluskap kills Akwulabemu and "straight away the springs and brooks filled with water that was clean and pure."

In one Gluskap tale, Wind Bird, Chief Raven's band hasn't hunted and fished in many days because it so windy they cannot get near any game and do not dare launch a canoe. Gluskap advises Chief Raven to send the Caribou boys up the mountain where the Wind Bird lives to tie his wings. But when they do so no wind blows at all. All the waters become stagnant and it is too warm for there is no cooling breeze. After consulting with Gluskap, Chief



Raven sends the Caribou boys to untie one of the Wind Bird's wings and let him loose. Since then everything has gone well.

We have been fighting to retain, rebuild, and protect our ancestral ways for over 400 years. Unlike other ethnic peoples, we have no other homeland to return to in order to learn about our cultural heritage. We are the last bastions of the unique language, history, traditions, stories, practices, and spiritual beliefs that make up our culture. When contamination and habitat degradation make it impossible to hunt, fish, or gather foodstuffs in accordance with our traditions, we can't pick up our trust lands and move them away from the sources of pollution. When a natural resource is adversely impacted or damaged by influences beyond the Tribe's control, a vital part of our cultural link is forever broken. Accordingly, preservation and protection of natural resources is preservation and protection of Tribal culture.

In 2000, we asked our membership to answer questions about trust lands and natural resources they want to purchase and how they want to use them. We also asked them to tell us anything else they wanted to at the end of the survey. These are some of their responses:

- "Culture and genealogy are very important -my grandfather hiked and trapped here, my great grandma use to gather wood here. I desire that the old ways be embedded in the young generations."
- "I think that land that would sustain life would be the best to purchase."
- "I think if we purchase land we should leave it in its original habitat and state. It would keep all the animals in the area for hunting and fishing."
- "I would love to see pristine nature made available."
- "I think that buying tribal lands is really great. It gives people a chance to explore the wilderness and to get to know themselves."
- "If possible it would be nice to purchase both land to be developed and land to be preserved."
- "I like anything we have. I like nature and animals that god brought to this earth."
- "I believe that our past is just as important; because our people have lost a big part of our past, we should rebuild our past in order to make an honest future for our children and grandchildren; you see our ways someday will be back. We need to teach our young people now for the future."
- "Remember our Future, the Children."

Our goal is to preserve and protect our people and culture by preserving and protecting the limited and precious natural resources on our trust lands forever, including the waters that are at the heart of our community.

## **II. EPA should deny Maine's request that its WQS revisions for arsenic, phenol, and acrolein apply in Indian Territory.**

In order to safeguard the Houlton Band's waters and its future, EPA should not approve Maine's request that its water quality standards apply in Maliseet territory. The EPA's trust responsibility requires the agency to protect tribal rights and resources. EPA has never determined that Maine has jurisdictional authority over Maliseet waters, and it should not do so



now. Further, Maine has not demonstrated that it can properly administer its Clean Water Act (CWA) program and regularly fails to protect tribal resources. As such, its WQSs should not apply in Indian Territory. If EPA grants the State's request that its WQSs apply there, which it should not, the agency must ensure that the Houlton Band have a decisive role in decision-making that affects its waters.

A. *EPA's trust responsibility to the Maine Tribes requires that it ensure water quality that will protect tribal trust resources.*

The EPA has an important role to play in helping the Houlton Band achieve the water quality protections described in the previous section because the agency's trust responsibility obligates it to protect tribal rights and resources. "EPA recognizes the federal government's trust responsibility, which derives from the historical relationship between the federal government and Indian tribes as expressed in certain treaties and federal Indian law." *EPA Policy on Consultation and Coordination with Indian Tribes* at 3 (May 4, 2011), available at <http://www.epa.gov/tp/pdf/cons-and-coord-with-indian-tribes-policy.pdf> (hereinafter *EPA Consultation Policy*). EPA's role as trustee carries with it the duty and power to protect the Maliseets. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886). The trust responsibility imposes upon the United States and all its agencies the obligation to follow "the most exacting fiduciary standards" in dealing with the tribes, as well as to protect tribal rights and resources. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995). Consistent with this relationship of trust, federal courts require that ambiguities in federal laws regarding tribes must be construed in the tribes' favor. *Penobscot Nation v. Feller*, 164 F.3d 706, 709 (1st Cir. 1999); *State Program Requirements: Approval of Application by Maine to Administer the National Pollutant Discharge Elimination System (NPDES) Program*, 68 Fed. Reg. 65,052, 65,055 (Nov. 18, 2003).

EPA has previously concluded, correctly, that the trust responsibility applies in Maine. 68 Fed. Reg. at 65,067. "[T]he argument that the trust doctrine finds no application in Maine defies the terms of [the Maine Indian Claims Settlement Act (MICSA)]." *Id.* "MICSA itself establishes trust resources for which the federal government is responsible and identifies tribal governments with which agencies such as EPA should work on a government-to-government basis consistent with that trust responsibility."<sup>2</sup> *Id.* The manner in which the Clean Water Act (CWA) is implemented in Maine, including water quality standard revision and enforcement, will directly affect tribal trust resources, and, in turn, tribal members' health, fishing opportunity, and ability to pass their culture on from one generation to the next. EPA must therefore use both its trust authority and its discretionary authority under the CWA to ensure water quality in Maliseet waters is not degraded. It must ensure that a broad range of tribal uses are protected, including the Band's reliance on water and water-dependent resources (e.g., fish, aquatic vegetation, drinking water, etc.) for traditional, ceremonial, subsistence, commercial, medicinal, and cultural purposes.

<sup>2</sup> The MICSA provisions cited by EPA as support for its conclusions as to the Passamaquoddy Tribe and Penobscot Nation in 2003 apply with equal force to the Houlton Band of Maliseet Indians. See 25 U.S.C. §§ 1721(a)(5), 1722(a), 1724, 1726; see also S. Rep. No. 96-957 at 11 ("All three tribes are riverine in their land-ownership orientation. . . . The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River.").



EPA has long acknowledged the importance to tribes of clean water sufficient to support these types of resources and uses, as well as many tribes' feeling that they themselves, and not the states, are in the best position to safeguard such resources.

Tribes require clean water for a domestic water supply and to maintain fish, aquatic life and other wildlife for both subsistence and cultural reasons . . . In short, clean water is a crucial resource that plays a central role in Tribal culture. Because clean water has a direct effect on the . . . health and welfare of . . . Tribes that is serious and substantial, . . . Tribes have a strong interest in regulating on-reservation water quality.

EPA, Memorandum in Support of Motion for Summary Judgment at 16, *Montana v. U.S. Envtl. Protection Agency*, 941 F. Supp. 945 (D. Mont. 1996); 68 Fed. Reg. at 65,056 ("Clearly, the physical setting of the . . . tribes in such close proximity to important rivers makes surface water quality important to them and their riverine culture."). EPA has described the special relationship tribes have with the natural environment and the importance to many tribes of leading pollution prevention efforts themselves as follows:

Indian tribes, for whom human welfare is tied closely to the land, see protection of the reservation environment as essential to the preservation of the reservations themselves. Environmental degradation is viewed as a form of further destruction of the remaining land base, and pollution prevention is viewed as an act of tribal self-preservation that cannot be entrusted to others.

EPA, *EPA, Federal, Tribal and State Roles in the Protection and Regulation of Reservation Environments* at 2 (July 1991), available at: [http://www.epa.gov/region4/indian/EPAStrTri\\_relations.pdf](http://www.epa.gov/region4/indian/EPAStrTri_relations.pdf) (hereinafter *EPA, Federal, Tribal and State Roles*).

EPA's prior statements are apropos in the context of Maine's request that its water quality standards apply in Maliseet waters. The Band's trust lands, amounting to less than one-tenth of one percent of the Maine land base, are an extremely limited resource with which to support an entire people and essential to the Band's survival. The Band is very concerned that Maliseet waters be protected at the level necessary to sustain the Band's trust resources, including its subsistence-based riverine culture and the passing on of that culture to future generations. In short, using EPA's words, the Houlton Band believes that pollution prevention "cannot be entrusted to others," including the State of Maine, which has a dismal track record when it comes to protecting Tribal interests. EPA should employ the authority stemming from its trust relationship with the Band to ensure that it is not.

- B. *EPA should deny Maine's request that it be allowed to apply its water quality standards in Indian Territory because it has not demonstrated it will establish designated uses and criteria sufficient to protect subsistence fishing and other tribal uses.*



Maine has shown no inclination or ability to ensure water quality sufficient to protect the Band's subsistence and other cultural uses of the water. The Houlton Band has described, in detail, significant problems with Maine's treatment of Indians and tribal resources in prior comments. We recount some of that history below, but ask that EPA review the Band's prior comments for more complete background that should inform the agency's decision. Specifically, the Band hereby incorporates by reference the comments and attachments that were submitted in response to *State Program Requirements; Approval of Maine's National Pollutant Discharge Elimination System (NPDES) Permitting Program*, 78 Fed. Reg. 13,339 (Feb. 27, 2013). Those documents are included here as Attachments A.1 to A.8. Given the overlapping nature of the two jurisdictional decisions concurrently before the agency, the Band also requests that the comments (and attachments hereto), which we now submit in response to EPA's "Public Notice of EPA's Review of Maine Water Quality Standard Revisions as they Apply in Indian Territories," are also included in the administrative record for the proposed NPDES delegation.

Maine's indifference to tribal resource needs is longstanding. When the United States Civil Rights Commission issued its official report on the treatment of Indians in Maine in December 1974, it described the State-Indian relationship as one of extreme indifference on the part of the State, characterized by discrimination in the administration of state and federal services and made worse by the fact that "Indians (in Maine) have seldom been included in the planning or decision-making process which affects their lives." See Maine Advisory Committee to the U.S. Commission on Civil Rights, Federal and State Services and the Maine Indian, Transmittal Letter, at 2 (December 1974). Unfortunately, even as the Houlton Band's capacity following federal recognition to take a more active role in protecting water quality in the Meduxnekeag Watershed has improved, the Band has found Maine's hostility toward tribal sovereignty and its disinterest in protecting resources of unique tribal concern unyielding.

Challenges to the relationship between the Band and the Maine Department of Environmental Protection (DEP) include DEP's:

- 1) General lack of familiarity with the Band and its membership's needs;
- 2) Failure to acknowledge or understand the Band's unique cultural and human health concerns regarding water quality;
- 3) Failure to recognize tribal sovereignty, consult with the Band on a government-to-government basis, or provide a seat at the table in decision-making that uniquely affects tribal interests; and
- 4) Statewide perspective that discounts the Band's local, place-based emphasis on the Meduxnekeag watershed.

In the Band's experience, Maine DEP seems to prefer to focus on the worst cases of impairment. Because it considers water quality issues in the Meduxnekeag relatively minor, it does not devote the attention and resources needed to protect the Band's traditional uses of the waters in and near its trust lands.

We have advocated tirelessly for changes to the system to redress such things as: 1) a persistent lack of consultation around rulemaking that affects the Band, and 2) a lack of consideration of actual tribal fish consumption rates in setting water quality standards. However, when informed that the State's environmental regulatory program is not protecting tribal culture,



health and welfare, Maine has failed to work with the Band to fix the problems. Relationship building with Maine DEP has thus suffered from the lack of any uniform policy or institutionalized process of engagement or consultation. In our view, even after many years of consistent Tribal advocacy, Maine DEP still fundamentally considers us just another stakeholder rather than a downstream sovereign with unique standing and needs.

In the instances in which Maine has accepted Tribal input and help, water quality has benefitted, but even then, Maine has dragged its feet. By way of example, the Band has worked hard to convince Maine DEP to rectify dissolved oxygen impairments in the Meduxnekeag River. When the Band saw a gap in Maine's monitoring for this parameter, the Band tried to fill it. At first, Maine DEP actively discouraged the Band from monitoring water quality, but our persistence eventually led the agency to offer water monitoring training. This eventually led to a collaborative effort to monitor water quality in the Meduxnekeag. Of course, the Band's ultimate goal in its monitoring effort was to actually remedy the impairments, but the process proved to be prolonged and contentious. The final outcome, a more restrictive phosphorus discharge limit for an upstream discharger, took *15 years* to accomplish. Even after that fight and even though water quality has improved, the river *still* does not meet the State's water quality standards for dissolved oxygen and bacteria. To be clear, this process involved pollution from an upstream discharger, which was affecting Maliseet waters downstream. The Tribe should not have to depend on such faltering progress on water quality standard revisions or enforcement in *its own waters*.<sup>3</sup>

These events (and those described in the attached comments) demonstrate the types of challenges we face with Maine DEP when it is tasked with environmental regulation and enforcement that affects tribal waters. The Houlton Band, however, is not alone. In one way or another, all tribes in Maine have been harmed by what the Maine Natural Resources Council has described as a "pattern of inadequate enforcement by [Maine] DEP of state and federal environmental laws." To make matters worse, Maine DEP enforcement activities have declined dramatically in recent years. Due to State inaction, many rivers and other water bodies that Maine tribes rely on for food, ceremonies, and medicines are contaminated by dangerously high levels of PCBs, DDT, lead, mercury, dioxin, arsenic, and other toxic chemicals. There are fish advisories for numerous waters that tribes traditionally fished.

If EPA allows state water quality standards to apply in Indian Territory, Maine DEP will, for the first time, be charged with enforcing the Clean Water Act in Maliseet waters. We strongly believe application of the state's water quality standards in Indian Territory (or delegation of the NPDES program to the State) would adversely impact the culture and traditions of the Band. As described above, the State has no consultation procedure or legal mandate designed specifically to protect the Band's cultural uses of our waterways, and, to date, the State has refused to provide such protections. Because Maine DEP has not administered its existing program to address the tribes' uses consistent with the requirements of the CWA, EPA should not allow the State to expand its faulty program to Maliseet waters. We therefore request that EPA not approve Maine's request that its water quality standards for various toxic pollutants apply in Maliseet waters.

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<sup>3</sup> Tribal efforts in the arsenic, phenol, and acrolein water quality standard revision processes, and the results of those efforts, are described below.



- C. *EPA should deny Maine's request because the Houlton Band is a federally recognized tribe with inherent authority to control activities on its trust lands.*

The Houlton Band is a federally recognized Tribe with inherent sovereignty and authority to regulate activities within its own lands. The right of self-government includes an Indian nation's "power of regulating [its] internal and social relations." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quotation marks and citation omitted). "[T]ribes have the power to manage the use of [their] territory and resources by both members and nonmembers." *Id.* at 335. The Band continues to maintain that Maine has no authority to apply its water quality standards in Maliseet waters. Instead, the EPA's default or tribal-specific standards should apply in Maliseet Territory, and EPA should ensure that Maine's permitting of upstream discharges imposes conditions that will ensure compliance with these water quality standards. See 40 C.F.R. §§ 122.4(d), 131.10. The Band hereby incorporates by reference the comments it made in earlier submissions to EPA with respect to Maine's application for delegation of NPDES authority in Indian Territory as support for its position, and has attached some of those comments for ease of reference. See Attachments A.1, A.2. EPA should deny Maine's request that its water quality standards apply in Maliseet waters.

- D. *If EPA approves Maine's request, the agency must fully protect tribal resources through both its WQS and enforcement oversight authority, and the agency must ensure that the Houlton Band has a meaningful role in decision-making that will affect its waters.*

If EPA approves Maine's request that its water quality standards apply in Maliseet waters over the Band's objection, which it should not, the agency must use its oversight authority to ensure water quality is protected at levels that will protect the Band's resources and riverine culture. An important method for achieving this result is for EPA to ensure the Houlton Band has a greater role in decision-making that affects tribal rights and resources than would an average Maine citizen. The Band is a sovereign and its members have a unique relationship to the St. John River Basin, including the Meduxnekeag River and the resources within it. Moreover, the Band has special expertise with respect to water quality in the watershed. Maine DEP's administration of the Clean Water Act and other environmental programs in the rest of Maine suggests the State will not adequately protect these resources on its own. In order to fulfill the agency's trust responsibility, EPA must therefore institute procedures and expectations that ensure Tribal rights and resources are protected.

As the Solicitor concluded in regard to Maine's initial application for NPDES authority in Indian country:

EPA must, in accordance with the best interest of the Tribes and the "most exacting fiduciary standards," faithfully exercise its federal authority and discretion to protect Maliseet . . . tribal water quality from degradation. EPA would take into consideration more than just the minimum requirements in the CWA in overseeing a State program to fully protect Tribal resources, including lands and waters. Specifically, EPA would have to consider the specific uses the



Maliseets . . . make of their tribal waters, including traditional, ceremonial, medicinal and cultural uses affected by water quality. EPA must be fully satisfied that it is able to meet its trust obligation to the Maliseets . . . even if it approves the State of Maine to administer the NPDES program. EPA should seek assurances from the State of Maine that the state will implement the NPDES program in a manner which satisfies EPA's trust obligations.

Solicitor's Opinion attached to Letter from Edward B. Cohen, Office of the Solicitor, Dep't of Interior to Gary S. Guzy, Office of General Counsel, Env'tl. Protection Agency, at 2 (May 16, 2000) (citations omitted).<sup>4</sup> The Solicitor's conclusions apply with equal weight to the matter of Maine's request to apply its WQSs in Maliseet water. Similarly, EPA has explained its discretion to ensure tribal rights and resources are protected, even where it delegates authority to Maine.

Where states have authority to promulgate water quality standards, EPA is . . . charged with reviewing those standards and can object to any standards that do not meet the requirements of the CWA. Again, if the state does not address EPA's objection, EPA ultimately has authority to take over promulgation of such standards. 33 U.S.C. 1313(c)(3). These oversight mechanisms attach to any state program implementing the CWA. They are not unique to programs in Indian country, and EPA's exercise of these oversight mechanisms in no way affects or preempts the jurisdiction or authority Maine has under MICSA and the CWA. . . .

Therefore, EPA concludes that MICSA and the CWA combine to charge EPA with the responsibility to ensure that permits issued by Maine address the . . . tribes' uses of waters within the state, consistent with the requirements of the CWA. . . . EPA is in a position, consistent with MICSA, CWA, and our trust responsibility, to require the state to address the tribes' uses consistent with the requirements of the CWA. As with any state implementing the CWA for EPA, the state's authority to do so remains contingent on the state program meeting all the Act's requirements.

68 Fed. Reg. at 65,067-68; *see also* 33 U.S.C. §(c)(2)(A), (c)(3); 40 C.F.R. §§ 131.5, 131.10, 131.22. Given Maine's track record and EPA's trust relationship with the Band, EPA must exercise its oversight authority over Maine's delegated program, including water quality standard promulgation, in a way that best protects tribal rights and resources. This includes requiring the State to provide the Band a meaningful role in Clean Water Act decision-making that will affect Maliseet waters, which is consistent with existing EPA policy encouraging communication and cooperation between sovereigns.

The Agency encourages cooperation between state, tribal and local governments to resolve environmental issues of mutual concern: Sound environmental planning

<sup>4</sup> *See also* Attachment A.2 (Maliseet comments cited in Solicitor's Opinion); 68 Fed. Reg. at 65,059 ("[T]he Department [of Interior] is the federal government's expert agency on Indian law and is charged with administering MICSA. The Supreme Court has made it clear that an advisory legal opinion such as DOI's May 16, 2000 letter is owed respect to the extent it is persuasive.").



and management require the cooperation and mutual consideration of neighboring governments, whether those governments be neighboring States, Tribes or local units of government. Accordingly, EPA will encourage early communication and cooperation among Tribes, States and local governments. This is not intended to lend Federal support to any one party to the jeopardy of the interests of the other. Rather, it recognizes that in the field of environmental regulation, problems are often shared and the principle of comity between equals often serves the best interests of both. . . . Under both authorized and EPA-administered programs for reservations, the Agency encourages cooperation between tribes and states, acting in the spirit of neighbors with a mutual self-interest in protecting the environmental and the health and welfare of the reservation populace.

*EPA, Federal, Tribal and State Roles* at 3-4. EPA has enumerated some of the ways in which sovereigns can structure and achieve that cooperation, ways that would lend themselves to developing and sustaining a cooperative relationship between the Maliseets and Maine. For instance, EPA has suggested:

[C]ooperation can take many forms, including notification, consultation, sharing of technical information, expertise and personnel, and joint tribal/state programming. While EPA will in all cases be guided by federal Indian law, EPA Indian Policy and its broad responsibility to assure effective protection of human health and the environment, the Agency believes that this framework allows flexibility for a wide variety of cooperative agreements and activities . . . .

*Id.* at 4. In order to encourage the desired cooperative relationship between Maine and the Houlton Band, EPA should require Maine to institute additional procedures, including notifications, state-tribal consultation, and technical information sharing, when State actions, such as water quality standard revisions, could affect water quality in Maliseet waters. It may also be useful for the EPA to act as a moderator in negotiations between the State and Band regarding such revisions, a role the agency has envisioned for itself under existing policy.<sup>5</sup> The Band offers the following specific recommendations:

- Maine DEP should provide the Band written notice of each water quality standard revision, as well as the opportunity for state-tribal consultation. The default position should be that Maine must accept the Band's reasonable recommendations on designated Tribal uses and criteria to protect those uses. If Maine does not accept the Band's recommendations, it must notify the Band and EPA in writing of its decision not to accept the recommendations and the reasons for its decision.
- Maine DEP should make any and all technical information related to water quality standard promulgation that may affect Maliseet waters available to the Band upon request. All such information should be sent to the Band within one week of the request.

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<sup>5</sup> *EPA, Federal, Tribal and State Roles* at 5 ("EPA encourages the tribal and state governments to resolve their differences through negotiation at the local level. EPA, in such cases, is prepared to act as a moderator for such discussions, if requested. Where a statute such as the Clean Water Act designates a conflict-resolution role for EPA in helping to resolve tribal/state differences, EPA will act in accordance with the statute. Otherwise, EPA will respond generally to such differences in the same manner that EPA responds to differences between states.").



The Band should not be burdened with submitting public records requests or travelling to a Maine DEP office for information relating to water quality in Maliseet waters.

- EPA should encourage Maine DEP to enter into an agreement with the Houlton Band to establish common policies and mutually agreeable procedures that will ensure the State's administration of the Clean Water Act will adequately protect water quality in Maliseet waters. EPA should make itself available as a moderator in the negotiation of this agreement, if the Band and the State so request.

These recommendations are consistent with MICSA. MICSA comes into play for federal laws only if those authorities *both* accord a special status or right to Indians and Indian land *and* "affect[] or preempt[] the civil, criminal, or regulatory jurisdiction of the State of Maine." 25 U.S.C. §§ 1725(h), 1735(b); *Shannon v. Houlton Band of Maliseet Indians*, 54 F. Supp. 2d 35, 38, 40 (D. Me. 1999). Encouraging and requiring the State to implement additional procedures to protect tribal lands and resources in no way affects, let alone preempts, state jurisdiction. It merely guides administration of a program for which EPA is delegating its jurisdiction. As EPA explained in the excerpt above, the trust responsibility and EPA's discretion under the CWA enable it to impose such requirements in order to ensure tribal resources are protected. Further, MICSA anticipates that Maine and the Houlton Band will enter into cooperative jurisdictional agreements from time to time. See 25 U.S.C. § 1725(e)(2). It is certainly within EPA's discretion to use its authority to encourage the State to sit down with the Band to negotiate such an agreement. As such, EPA should take these reasonable steps to ensure that the State would revise and enforce WQSs in a manner that satisfies EPA's trust obligations.

Beyond requiring additional process on the part of the State, EPA should itself commit to certain procedures that will better ensure protection of water quality in Maliseet waters. As described above, EPA's policies acknowledge the trust responsibility and obligate the agency to consult with tribes when its actions may affect tribal rights or resources. *EPA Consultation Policy* at 1. The consultation policy states: "EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests." *Id.* at 1. EPA actions and decisions regarding rulemakings and permitting that may affect tribal interests are generally regarded as appropriate topics for government-to-government consultation. *Id.* at 5. Because EPA will continue to exercise oversight authority over water quality standard revisions, government-to-government consultation on all such permits is necessary and appropriate.

- EPA should give timely notice to the Band of any water quality standard revisions that may affect tribal waters or resources. In this notice, EPA should offer the Band the opportunity to engage in government-to-government consultation. Where the Band elects to engage in such consultation, the consultation will ensure EPA understands any concerns the Band might have about the revision, so the agency can ensure protection of Tribal resources in the exercise of its oversight authority.
- EPA should enter into an agreement with the Houlton Band that assures consultation and coordination, consistent with EPA's federal trust responsibility, regarding EPA's oversight of Maine's CWA program, as well as outlines how EPA will work with the Houlton Band to study the Band's use of the water.
- EPA must disapprove WQS revisions that will not protect tribal uses, including where WQS criteria are based on inaccurate fish consumption rates, and instead put in place and



enforce substitute WQSs that will protect tribal uses.

- EPA should work with the Houlton Band to study uses of waters important to the Band's culture and develop data to assess how water quality standards in the Meduxnekeag River and other waters important to the Band protect those uses. In order to advance this effort, EPA should make financial and technical assistance available to the Band. EPA should use results of the studies in assessing the adequacy of existing and proposed water quality standards, and, where necessary, use this information to press for standards adequate to protect tribal uses.
- EPA should use the full extent of its enforcement authority to discontinue (and mitigate for) any discharges that affect the Maliseets' use of its waters.

### III. Comments on Specific Water Quality Standards

Water quality standards are the foundation of the Clean Water Act's water quality-based control program. They define goals for a water body by designating the uses that water body supports or should support ("designated uses"). They set criteria designed to protect those uses and measure progress made ("criteria"). They establish anti-degradation policies, so that existing uses and water quality necessary to support those uses are protected and so that bodies with very high quality water do not become impaired. The triennial review of WQSs is designed to ensure the standards align with current science and the uses of specific water bodies by people and aquatic life.

EPA should disapprove Maine's proposed arsenic, phenol, and acrolein WQS revisions because the proposed criteria do not adequately protect Maliseet members' subsistence fishing and other uses that are critical to tribal health and culture. Moreover, as further reason EPA should not allow the State's WQSs to apply in Maliseet territory, the Band highlights significant problems with the State's WQS for nutrients, which is of critical importance to the Band and the health of the Meduxnekeag River. In sum, Maine's proposed revisions do not meet the needs of a riverine people, such as the Maliseet, and therefore EPA should disapprove the WQSs and establish replacement WQSs that do meet tribal needs.

#### A. Arsenic WQS

EPA should disapprove Maine's water quality standard revision for arsenic.<sup>6</sup> As a toxic pollutant, arsenic in the Meduxnekeag River is a concern for the Band and its members. As proposed, the arsenic criterion does not consider other exposure routes and possible synergistic effects. In 2007, drinking water well tests results for local tribal wells revealed measurable amounts of arsenic. Arsenic was used as a pesticide in Maine between 1920 and the late 1960s, so past, present and future exposures to contaminated soil are a threat. Additionally, the potential for inorganic arsenic to have synergistic effects when ingested with other neurotoxins or carcinogens are not fully known at this time. As one example, the Meduxnekeag River and all rivers in Maine are known to have elevated mercury. Further, the EPA's *Technical Support Document for Water Quality-Based Toxics Control* (1991), states "...mass-based effluent limits alone may not assure attainment of water quality standards in waters with low dilution. In these

<sup>6</sup> Please see Attachments A.3, A.4, A.5, D, and F, which are testimony and comments the Band has previously submitted to Maine regarding the toxics rule and arsenic WQS.



waters, the quantity of effluent discharged has a strong effect on the in-stream dilution and therefore upon the river water concentration.” Upstream of the Band’s trust and fee lands is the Houlton Water Company. This water treatment plant already discharges arsenic into the river (though there is not currently an arsenic discharge limit in the plant’s permit),<sup>7</sup> and desired industrial development in Houlton is sure to increase these discharges in the future. As a downstream sovereign, the Band is concerned about such discharges and whether the arsenic WQS sufficiently protects tribal uses.

Another major problem with the arsenic WQS is the fish consumption rate (FCR), which is one of the factors considered in developing criteria for toxic pollutants, that Maine applied. EPA is already aware that the Houlton Band has grave concerns regarding Maine’s consideration of tribal fish consumption rates, or lack thereof. The FCR is extremely important because it is used in the formula to determine how much toxic pollution should be tolerated in water bodies used by the Band. If the rate is set too low (i.e., erroneously assuming people eat very little fish), then more toxic pollution will be allowed. In turn, this can expose people dependent on locally caught fish for subsistence to levels of toxins that make them vulnerable to cancer and other diseases.

We have made it clear to Maine—including through comments on general revisions to Chapter 584 - Surface Water Quality Criteria for Toxic Pollutants in 2005, comments on specific changes proposed regarding arsenic’s cancer risk level in 2011, and various meetings—that the State should use fish consumption rates that reflect our cultural use of the resource. Specifically, we have recommended a rate of 286 grams/day based on an EPA-funded study of the five federally recognized Tribal Nations in Maine: *Wabanaki Traditional Cultural Life-ways Exposure Pathway Scenario*.<sup>8</sup> This study resulted in the development of the Wabanaki Cultural Lifeways Exposure Scenario, which is a numerical representation of the environmental contact, diet, and exposure pathways present in traditional cultural lifeways in Maine. These traditional uses are described as a single best representation of subsistence - traditional lifeways. This study is intended to reflect the lifeways of people fully using natural resources and pursuing traditional cultural lifeways, not lifeways of people with semi-suburban or hybrid lifestyles and grocery-store diets. As Maine informed EPA, it is inappropriate to use the habits of people with hybrid lifestyles, such as recreational fishermen, in determining a FCR protective of tribal members who rely on locally caught fish for daily sustenance. See Attachment B.

As usual, Maine’s initial WQS did not reflect the Band’s concerns and did not consider available information relevant to fish consumption when calculating its human health criteria. Instead, it proposed a fish consumption rate of 32.4 grams/day. Maine’s original consumption rate was developed based on a 1992 Chemrisk study, which does not adequately account for Native American cultural practices for several reasons. The study was initiated after fish consumption guidelines were already in place, thus potentially showing depressed fish

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<sup>7</sup> The Tribe has not had access to monitoring information on the plant’s discharges, but we are under the impression that when monitoring was occurring, the test used was not sensitive enough to detect whether the effluent limit was being exceeded. EPA may have more information on the extent of arsenic contamination in the Meduxnekeag River.

<sup>8</sup> We have attached this study as Attachment E. It is also available at: <http://www.epa.gov/region1/govt/tribes/pdfs/DITCA.pdf>.



consumption rates due to toxic exposure concerns. Also, the sample size of 43 Native Americans anglers is too low to make any statistically valid conclusions regarding fish consumption in this population. Finally, because the study targeted anglers with Maine State licenses, it completely missed tribal members who obtain their licenses from tribal governments. The FCR thus failed to recognize or protect the fundamentally important cultural practice of fishing to provide food for family and community, which threatens the health and welfare of our Tribe. The inadequacies of the FCR compound already inadequate WQSs, further harming tribal interests.

It took EPA pressure in order for Maine to eventually increase the FCR to 138 grams/day. See 40 C.F.R. § 131.11(a) (requiring EPA to ensure that criteria are based on sound scientific rationale); Attachment B (EPA letter to Maine indicating FCR was too low). However, even though Maine increased the FCR, Maine did not use important survey data showing a still higher consumption rate was warranted. EPA should not countenance unscientific manipulation of variables used in determining the arsenic WQS's criteria, which endangers sensitive populations and fails to meet the requirements of the CWA. Moreover, EPA should not accept Maine's 138 grams/day FCR, which surveys indicate is inaccurate and insufficient to protect sensitive populations in Maine.<sup>9</sup> Because Maine has not met the requirements of the CWA, EPA should instead issue and enforce its own arsenic WQS in Maine.

#### *B. Phenol & Acrolein WQSs*

The Houlton Band also requests that EPA disapprove Maine's WQSs for phenol and acrolein, in addition to not allowing these WQSs to apply in Maliseet waters. A major problem with these WQSs is that their criteria do not rely on an adequate FCR. Unlike the arsenic WQS, where Maine ended up relying on a FCR of 138 grams/day,<sup>10</sup> Maine reverted to its original, exceedingly low FCR of 32.4 grams/day in developing the criteria for phenol and acrolein. It is arbitrary and capricious for Maine DEP to rely on a FCR of 138 grams/day in one WQS revision and a FCR of 32.4 grams/day in the other. Accordingly, EPA should disapprove Maine's WQSs for phenol and acrolein, and substitute its own WQSs in their place. Criteria for the WQSs should be based at minimum on the higher state FCR of 138 grams/day, as described above. More appropriately, they should be based on the recommended FCR of 286 grams/day.

#### *C. Nutrient WQS*

Although EPA did not seek comment on other Maine WQS revisions, and therefore should not apply any such Maine WQSs in tribal waters, the Houlton Band would like to draw the agency's attention to the nutrient WQS. Maine's WQS for nutrients does not adequately protect the Meduxnekeag watershed, and it is another reason Maine's WQSs should not apply in Maliseet waters. In 2012, Maine proposed nutrient criteria that, if adopted, would condemn our River to continued water quality impairment in the long term, including low dissolved oxygen

<sup>9</sup> Please note that this FCR is lower than the FCR the Wabanaki survey demonstrates is warranted.

<sup>10</sup> For instance, Oregon, a state where many tribal members similarly rely on locally caught fish for daily sustenance, recently established a fish consumption rate of 175 grams/day in the face of pressure from EPA and the public. Please see the above discussion explaining why even 175 grams/day is too low a FCR for Maine.



rates and significant algal blooms at low flow conditions during the summer months. This situation jeopardizes the Band's efforts to improve water quality conditions for resident cold water fish - and our access to them - and our long term goal of reintroducing a population of sea run Atlantic salmon. In their attempt to establish a state-wide nutrient standard, Maine DEP disregarded the unique circumstances existing in the Meduxnekeag and undermined their own TMDL study, finalized in 2001, which established a lower phosphorus discharge limit than would be allowed under these proposed criteria. We are interested in speaking further with EPA regarding this matter, and we have attached comments the Band has previously submitted on this issue. See Attachment C.

#### **IV. EPA should not rush a decision on fundamental jurisdictional issues based on Maine's threats of litigation.**

EPA has never before concluded that Maine has legal jurisdiction within the Northern Tribes' waters. Currently pending before the agency are Maine's applications for both National Pollutant Discharge Elimination System (NPDES) and water quality standard (WQS) authority in Maliseet waters. The Houlton Band disputes that the state of Maine has any authority to administer either aspect of the Clean Water Act in its territory. The Band notes that these processes are distinct, and so too must be the agency's analysis of the jurisdictional issues and the discretionary authority it retains under the statutory and regulatory provisions of the Clean Water Act. Decisions on one application should not necessarily dictate the agency's conclusion on the other.

Time and again, Maine has wasted limited state resources on litigation regarding jurisdictional theories that would have been better spent administering its existing CWA authority and protecting water quality for the benefit of its citizens and members of downstream Tribes. When invited to consult with the EPA and the Tribes on its request, the State instead sent a 60-day notice letter announcing its intent to sue EPA on July 23, 2013. The Band asks that EPA, as its federal trustee, not rush to judgment on these matters merely because Maine threatens litigation. Here, as with the NPDES delegation question,<sup>11</sup> the EPA must take time to consider the jurisdictional legal landscape and its trust responsibility to the Tribes.

#### **V. Conclusion**

To summarize, the Houlton Band of Maliseet Indians asks EPA not to grant Maine's request that its water quality standards for various toxic pollutants, or any of its other WQSs, apply in Indian territory. If the agency chooses to grant Maine's request over the Band's

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<sup>11</sup> As mentioned, Maine has applied for delegated NPDES authority in the Band's waters. See *State Program Requirements; Approval of Maine's National Pollutant Discharge Elimination System (NPDES) Permitting Program*, 78 Fed. Reg. 13339 (Feb. 27, 2013). Before EPA could fully consider the jurisdictional issues and reach a conclusion on the State's application, the State rushed to court and unsuccessfully attempted to wrest an approval of its NPDES program from the First Circuit. Recognizing EPA's progress in considering Maine's application and the State's failure to promulgate cooling water intake structure regulations (a prerequisite for approval) many years after EPA's initial delegation of program authority, the First Circuit concluded there was "no reason for [the Court] to become involved in this process." *Maine v. Jackson*, No. 12-1923, at \*1 (Aug. 15, 2013). Consequently, that decision process will conclude once Maine finalizes its cooling water intake regulations and EPA reviews the full administrative record before it.



objections, the agency has both the duty and the authority, consistent with the trust responsibility and its discretionary authority under the CWA, to maintain a heightened degree of oversight over Maine's delegated program as it applies to Maliseet waters. EPA should guarantee the Band a significant role in decision-making that affects its waters in order to ensure tribal uses are protected. Maintaining this degree of oversight and providing the Band a meaningful role in such decisions is consistent with both the Clean Water Act and MICSA. The Band appreciates the opportunity to comment on this matter, and requests that EPA engage in government-to-government consultation with the Band as the process continues.

Sincerely,

*Brenda Commander*

Chief Brenda Commander  
Houlton Band of Maliseet Indians

cc

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